SUPREME COURT, U. S.

MAR 11 1968

JOHN F. DAVIS, CLERK

No. 808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE AMERICAN WATERWAYS OPERATORS, INC., *Appellant,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky at Louisville

BRIEF FOR THE AMERICAN WATERWAYS OPERATORS, INC.

A. ALVIS LAYNE
915 Pennsylvania Building
Washington, D. C. 20004

ROBERT L. WRIGHT
1000 Woodward Building
Washington, D. C. 20005

Attorneys for Appellant, The American Waterways Operators, Inc.

S. RUSSELL SMITH
500 Marion E. Taylor Building
Louisville, Kentucky 40202
Of Counsel

March 1968

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Statement	3
Summary of Argument	4
Argument	10
I. The Out-Of-Pocket Cost Standard Proclaimed by the District Court Would Not Prevent Destruction of More Efficient Barge Competition by Rail Rate Cuts	10
II. The Commission's Full Cost Standard Fairly Determines Inherent Cost Advantages	12
III. Commission Intervention Is Needed To Preserve Intermodal Competition for Bargeline Traffic	16

CITATIONS

STATUTE:

Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, as amended by 54 Stat. 899 and 72 Stat. 572:
Section 15a(3) 2, 4
National Transportation Policy preceding 1, 301, 901, and 1001 2

CASES:

Grain In Multiple-Car Shipments—River Crossings to South, 321 I.C.C. 582; reversed on other grounds, 229 F. Supp. 572, and remanded to the Commission after vacation of District Court's order by this Court at 379 U.S. 642 12
Ingot Molds from Pennsylvania to Steelton, Ky., 323 I.C.C. 758 1

Page

Ingot Molds from Pennsylvania to Steelton, Ky., 326 I.C.C. 77 1
Interstate Commerce Commission v. *New York, N.H. & H.R.R. Co.*, 372 U.S. 744 ..... 4, 8
Louisville and Nashville Railroad Co. v. *United States*, 268 F. Supp. 71 1
Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115 11
Rules to Govern the Assembling and Presenting of Cost Evidence, 321 I.C.C. 238 ..... 14, 15 n. 12
United States v. *National Dairy Products Corp.*, 372 U.S. 29 11

MISCELLANEOUS:

Cost Accounting System for Ground Modes of Common Transportation Carriers, September 1966, Department of Commerce ..... 13 n. 9
McGehee, *The Inherent Advantages of Carrier Modes Under the National Transportation Policy*, 34 ICC Prac. J. 722 (1967) ..... 10, 11 n. 6
Nathanson, *Intermodal Competition and the Minimum Rate Power*, 58 Nw. U. L. Rev. 583 (1963) ..... 12 n. 8
Nelson, *Rate-Making in Transportation—Congressonal Intent*, 1960 Duke L. J. 221 ..... 11 n. 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 808

THE AMERICAN WATERWAYS OPERATORS, INC.,
Appellant,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and PENNSYLVANIA RAILROAD COMPANY, ET AL., *Appellees.*

On Appeal From the United States District Court for the Western District of Kentucky at Louisville

---

BRIEF FOR THE AMERICAN WATERWAYS OPERATORS, INC.

OPINIONS BELOW

The opinion of the District Court is reported at 268 F.Supp. 71. The report of the Interstate Commerce Commission is reported at 326 I.C.C. 77, and the preliminary report of a division of the Commission is reported at 323 I.C.C. 758. These reports appear in

full in the joint appendix filed in this Court. The appendix page references in this brief are to that appendix.

JURISDICTION

The judgment of the District Court was entered on May 15, 1967, and notice of this appeal was filed in the District Court on July 12, 1967. The time for docketing this appeal in this Court was subsequently extended to and including November 9, 1967, by successive orders of the District Court and this Court. Probable jurisdiction was noted on January 15, 1968.

STATUTE INVOLVED

Section 15a(3) of the Interstate Commerce Act (49 U.S.C. § 15a(3)), as amended by the Transportation Act of 1958, 72 Stat. 572, and the statement of National Transportation Policy (49 U.S.C. preceding 1, 301, 901, and 1001), 54 Stat. 899. As so amended, section 15a(3) provides that minimum rates "shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." That policy states that the Act shall be "so administered as to recognize and preserve the inherent advantages of each" mode of transportation subject to the Act.

QUESTION PRESENTED

Our jurisdictional statement states the question as follows:

> When the Commission finds that a rail rate has been reduced on traffic "of far more consequence to the barges than to the railroads" to a point where "all of the traffic would move by rail" and thus threatens the ability of the barges "not only

to compete, but to exist" (App. 57, 53, 57),[1] and further finds by a comparison of fully distributed costs that the barges are the low-cost carrier; may the railroads justify the reduction on the ground that the reduced rate exceeds their out-of-pocket costs.

Since the District Court's acceptance of the railroads' out-of-pocket cost justification required rejection of the Commission's fully distributed cost comparison, the question may be more briefly stated as follows:

Did the District Court err in rejecting the use of fully distributed costs to determine the low-cost carrier.

STATEMENT

The American Waterways Operators, Inc. is a national association of shallow draft water carriers that intervened in the Court below to support the Commission's order. For a full statement of the proceedings below and the relevant facts, we rely upon the Statement in the brief of the Interstate Commerce Commission. Our Statement is confined to the following decisive facts found by the Commission:

1. The railroad appellees cut their rate for carrying ingot molds from Pittsburgh, Pennsylvania, to Steelton, Kentucky, from $11.86 to $5.11 per ton.

2. The $5.11 rate was low enough to divert to the railroads substantially all of this ingot mold traffic from the bargeline then carrying it.[2]

---

[1] The corresponding references in the Joint Appendix are J.A. 68, J.A. 64, and J.A. 68.

[2] The movement is one in which trucks also participate, but it is discussed hereafter as a barge movement because most of the revenue goes to the bargeline.

3. This class of traffic "is of far more consequence to the barges than to the railroads" (J.A. 68).

4. The fully distributed cost of rendering this transportation service was $7.594 for the railroads and $5.196 for the barge-truck movement.

5. The out-of-pocket cost of this railroad service ($4.689) was "lower than the barge-motor lines' variable costs. Therefore, the railroads can wage the rate battle as long or longer than the bargelines" (J.A. 71).

The District Court set aside none of these findings. Its rejection of the Commission's decision seems to rest upon its conclusion that because "compensatory rates should normally be allowed" (J.A. 31-32), "relevant out-of-pocket costs" (J.A. 31) should be compared to find the low-cost carrier. We argue that this was an erroneous conclusion.

SUMMARY OF ARGUMENT

We assume that the 1958 amendment to section 15a(3) of the Commerce Act prevents the Commission from rejecting a rail rate reduction merely because it threatens to exclude a competing mode of transportation from carrying the traffic affected by the reduction. We also assume that Congress intended to permit the Commission to reject a rail rate reduction which threatens to exclude a competing mode from carrying traffic if the competing mode can carry the traffic at a lower cost. We do not argue these propositions because we believe they were established by this Court's *New Haven* decision.[3]

---

[3] *Interstate Commerce Commission* v. *New York, N.H. & H.R.R. Co.*, 372 U.S. 744 (1963).

Our argument also assumes that the rail out-of-pocket cost figure of $4.869 is a permissible cost allocation for the purpose of determining whether the $5.11 ingot mold rate is a profitable rail rate and that the fully distributed cost figures of $7.594 and $5.196 are equally permissible cost allocations for the purpose of distributing the total costs of a railroad and a bargeline, respectively, among their total traffic movements. For the limited purpose of this argument, it need only be understood that the difference between the railroad fully distributed and out-of-pocket cost figures is substantially attributable to the exclusion from the out-of-pocket figure of very large constant costs peculiar to the ownership and operation of a railroad.[4]

There are, of course, a number of different kinds of inherent advantages of bargelines when compared with railroads and they may be measured in different ways. The main thrust of this argument is that one of these inherent advantages derives from the bargelines' use of public waterways and that the scope of this particular inherent advantage may only be measured by comparing the full costs of these two modes of transportation. For this reason, out-of-pocket cost comparisons will not prevent destruction of bargeline competition by railroads. We shall first show that out-of-pocket cost comparisons will not prevent destructive

---

[4] The $7.594 fully distributed cost figure includes all variable and all constant costs while the $4.869 out-of-pocket figure includes all variable and some constant costs. The term out-of-pocket is therefore somewhat misleading in suggesting that only the additional costs incurred to move the additional traffic in question are included. However, the technically correct description, "long-range out-of-pocket costs," is no clearer than the District Court's "relevant out-of-pocket costs" label and we shall use the term "out-of-pocket" to mean costs less than full costs.

rail rates, then show that a fully distributed cost comparison will reflect the advantage inherent in the bargelines' use of public waterways.

1. Railroads are able to charge substantially different prices for transportation service with similar costs because they carry thousands of different commodities under widely varying competitive conditions. For example, the ratio of railroad rates to out-of-pocket costs for individual commodities varies from 110 for carrying coal to 249 for carrying machinery parts. The ratio for commodity groups ranges from 107 for Animals and Products to 152 for Manufacturers and Miscellaneous (J.A. 144). The same ratio ($5.11 divided by $4.869) for the ingot mold rate in issue here is 105. The end result of such value of service rather than cost of service pricing is that 65 percent of a railroad's traffic moves at rates below the traffic's pro rata share of the full cost of running a railroad (J.A. 141, 155). This long-established discriminatory method of pricing by which many shippers contribute less than their pro rata share of a railroad's total freight revenue and some contribute more has been permitted by the Commerce Act.

Bargelines, on the other hand, are incapable of such discriminatory pricing. There is relatively little difference between barge fully distributed costs and out-of-pocket costs because bargelines "do not furnish or maintain their own roadway plant" and "their total expenses vary closely with the volume of traffic handled" (J.A. 157). Bargelines handle a comparatively limited number of commodities and their total volumes do not approach those of railroads. Unlike railroads, they can not earn profits from rates that do not approximate full costs. Bargeline rates must be

based on a narrow margin of profit because they carry only low-rated traffic, subject to competition from other modes of transportation. Moreover, bargelines can not afford to engage in rate wars with railroads because they move nothing that railroads can not move while railroads carry huge volumes of traffic between points not reached by waterways.

The out-of-pocket cost standard adopted by the District Court would, if adopted by the Commission, permit the railroads to preempt traffic essential for barge-line survival, regardless of the relative efficiency of barges and rails in moving the traffic. Barges are often lower cost carriers than railroads because barges move on publicly owned waterways and railroad cars move on privately owned tracks. A full cost comparison will reflect this inherent advantage—an out-of-pocket cost comparison will not, as the Commission found in this case.

2. The Commission has usually compared fully distributed costs to find the more efficient mode and the sole purpose of such a cost comparison is to determine whether there is a public advantage in protecting one mode from another's destructive competition. In recognition of the railroads' normal use of rates that do not vary consistently with variations in cost, the Commission will not disallow a railroad's reduction of a rate below its full costs upon proof that it was aimed at the elimination of intermodal competition. Unless the competitor threatened with elimination shows also that it is more efficient than railroads in moving the traffic in question, the Commission grants no protection against such a rail rate cut. There is no antitrust remedy and, if the Commission does not act, the competing mode must simply suffer the loss of this traffic.

This approach to the problem of preserving intermodal competition gives the railroads an extraordinary advantage that an application of antitrust principles denies to other industries.

The Court below set aside the Commission order here because it thought out-of-pocket costs were the only relevant costs; the $5.11 rate exceeded the rail out-of-pocket costs and such compensatory rates should normally be allowed. The purpose of the Commission's cost comparison, however, was to identify the lower cost mode and not to find whether the $5.11 rate was compensatory for the railroads. The District Court's reasoning thus ignored the inherent advantage problem.

The District Court criticized the Commission's full cost comparison, but offered no analysis to show that an out-of-pocket cost comparison would disclose which mode had an inherent cost advantage and was therefore more efficient. Most courts are reluctant to make such relative efficiency judgments when an expert agency, intimately familiar with the performance and problems of the business units involved, has been authorized by Congress to make such a judgment. In *New Haven,* the railroads successfully argued that this Court "should not attempt to advise the Commission how an inherent low cost advantage should be determined. . . ." (p. 9, Brief for Appellees, *New Haven, et al.*) and this Court did not do so. There is, therefore, no judicial precedent that determines what makes one mode of transportation more efficient than another.

A barge movement would appear to be a less costly method of transporting commodities suited to barge handling between two points on a river than a rail movement and the only cost comparison that will

tell whether this apparent low-cost advantage is real is a comparison of fully distributed costs. Such a comparison is needed to reflect the cost advantage resulting from the barges' use of publicly owned and maintained waterways as against the railroads' use of privately maintained rails, rights of way, switching yards, and terminals.

Whether an inherent advantage from the use of public waterways is an unfair advantage is not a judgment for the Commission or the courts to make. The decision to permit and encourage this transportation use of public waterways has been made by Congress and may be revoked only by Congress. The Commission is not authorized to decide that the public advantages of the low-cost competition offered by barges to other forms of transportation should not be preserved even if it should believe that such advantages did not equal the public cost of maintaining such waterways.

3. The railroads are free to urge Congress to destroy the advantages of bargelines inherent in public ownership and maintenance of waterways, but the railroads have not been authorized to do the job themselves by an unrestricted use of their own extraordinary power to destroy barge competition by rate reductions. The scope of railroad power is only partially revealed by the facts noted by the Commission in its discussion in this case of destructive barge-rail rate wars (J.A. 68). The available published data assembled at page 16 of this brief shows that sixty percent of the revenue of all Class A bargelines reporting to the Commission are received from transportation of five classes of commodities. The bargeline revenue from this traffic is less than ten percent of the revenues received from these classes of commodities by their eastern and south-

ern railroad competitors. The conclusion of the Court below that the railroads may increase their existing domination of this traffic, so long as they keep their rate reductions above their out-of-pocket costs, is plainly wrong, and the decision should be reversed.

ARGUMENT

I. The Out-of-Pocket Cost Standard Proclaimed by the District Court Would Not Prevent Destruction of More Efficient Barge Competition by Rail Rate Cuts

Neither the District Court nor the railroads considered the problem of how to appraise the public advantages inherent in bargeline transportation. The railroads urged that any rail rate in excess of incremental costs [5] should be allowed because it is a compensatory rate. Both the District Court and the railroads reached this erroneous conclusion by ignoring obvious fundamental differences between barge and rail costs. Railroads have widely variable costs per unit of transportation service, depending on the extent to which they utilize their extraordinarily large fixed plant. Bargelines have relatively constant low costs per unit of transportation service because they have little fixed plant. A railroad's unit costs go down with increased use of its large fixed plant while a bargeline's unit costs remain relatively constant with increased use of existing waterways.

The legislative history of the Congressional policy to recognize and preserve the inherent advantages of each mode of transportation shows that protection of such low-cost water transportation "from out-of-pocket competitive rate-making" by railroads is the heart of

[5] The railroad economists used "incremental costs" interchangeably with "out-of-pocket costs" (J.A. 139).

this policy.[6] Out-of-pocket cost rate-making was the means by which railroads drove boats from the rivers in the past. It is still an obvious means of destroying bargeline competition and thereby destroying the advantages of using public waterways for low-cost transportation that Congress created and intended to preserve.[7]

In this case the ratio of the reduced ingot mold rate to out-of-pocket costs was only 105. The extraordinary nature of this reduction is apparent when this 105 ratio is compared with the average ratio of 152 for Manufactures and Miscellaneous, the class of traffic embracing ingot molds. When aimed at the elimination of a competitor, such discriminatory pricing adversely affects competition in the same manner as discriminatory pricing of industrial products. In antitrust cases, this Court has condemned such predatory price-cutting without determining whether the cut price returns a profit on out-of-pocket costs. *Cf. United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 34 (1963), and *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 117-18 (1954).

The Commission makes a cost analysis of predatory price cuts only because the Commission applies a more lenient standard of liability than the antitrust laws provide. The Commission construes its mandate to preserve intermodal competition as warranting protection against such anti-competitive pricing only when it finds that the injured mode is the lower cost mode.

---

[6] McGehee, *The Inherent Advantages of Carrier Modes Under the National Transportation Policy*, 34 ICC Prac. J. 722, 725 (1967).

[7] Nelson, *Rate-Making in Transportation—Congressional Intent*, 1960 Duke L.J. 221, 228-29.

Yet the railroads would frustrate even this limited protection of intermodal competition by sanctioning any predatory rate so long as it yields a railroad profit.

II. The Commission's Full Cost Standard Fairly Determines Inherent Cost Advantages

The total expenses of a railroad include the cost of owning and maintaining extensive tracks, rights of way, switching and terminal facilities. The total expenses of a bargeline do not include any comparable expenses because Congress permits bargelines to use waterways built and maintained by public funds. Railroad economists call this a bargeline subsidy; but, however labeled, it provides low-cost transportation that carries public benefits in the form of low rates.

As the Commission said, in rejecting an argument that part of the public cost of maintaining waterways should be attributed to bargelines in making intermodal cost comparisons:[8]

> Inherent advantages must be determined on the basis of costs of operation which the different modes actually bear and not on the basis of hypothetical costs which would have been incurred if the historic policy of the Congress were different. *Grain In Multiple-Car Shipments—River Crossings to South,* 321 I.C.C. 582, 592 (1963); reversed on other grounds, 229 F.Supp. 572, and remanded to the Commission after vacation of District Court's order by this Court at 379 U.S. 642.

The Commission's full cost comparison reflected this advantage and any cost comparison limited to the costs that vary with the volume of traffic handled does not.

---

[8] See also the discussion of this decision in Nathanson, *Intermodal Competition and the Minimum Rate Power,* 58 Nw. U. L. Rev. 583, 610 (1963).

Terminal, maintenance, and ownership of right of way costs are borne by railroads and not by bargelines whether they carry ingot molds or not.[9] While some of these costs may vary to some extent with the volume of traffic carried, they are all among the constant costs included in the fully distributed cost comparison made by the Commission. Under the definition of "relevant out-of-pocket costs" relied upon to show that the all-rail rate is compensatory, a substantial part of these constant costs was excluded.[10]

The issue for decision below was not whether compensatory rates should usually be allowed, but whether

---

[9] Studies made for the Office of the Under Secretary of Transportation, Department of Commerce, and published as *Cost Accounting System for Ground Modes of Common Transportation Carriers*, September 1966, while illustrating the difficulty of determining by any accounting formula the precise cost of particular movements, point up the existence of substantial constant costs for railroads that do not exist for barges. For example, Volume III: Barge Manual, Section II, Chapter I, Introduction, notes that:

> Because most terminal operations are carried on by shippers and receivers, barge lines generally do not have sizable terminal operations and thus the assignment of terminal costs to specific shipments—one of the most elusive problems in much transportation cost-finding—is generally not a major problem area in barge line cost-finding.

Volume I: Railroad Manual, lists at page 34, Service Costs for Rail, Highway and Barge Transportation. The item "Maintenance and ownership of way, by geographically located facilities for originating and terminating traffic" appears only in the Rail column. Railroads, by virtue of their extensive holding of real property, also bear a real estate tax burden that barglines do not.

[10] Rail Form A, the formula used in this case to determine the railroads' out-of-pocket costs, excludes 20 percent of the railroads' full operating costs, rents, and taxes other than income taxes; and also excludes a four percent return on 50 percent of the railroads' fixed property.

the Commission had made a proper cost comparison to determine whether bargelines or railroads had lower costs. The Commission's cost comparison was not made for the purpose of determining whether the decisions of either the railroads or bargelines to move ingot molds between the specified points at the $5.11 rate was economically sound. The sole purpose of the comparison was to find out whether the bargelines had an inherent cost advantage that would justify suspension of a rail reduction which threatened to exclude bargelines from this movement. The Commission's full cost comparison reflected the advantages inherent in the barges' use of publicly owned waterways. The railroads' out-of-pocket cost computation showed at most that the $5.11 rate was a compensatory rail rate. In this context, the District Court's rejection of the Commission's fully distributed cost comparison because "compensatory costs should normally be allowed" ignored the regulatory problem of the Commission.

In Docket No. 34013, *Rules to Govern the Assembling and Presenting of Cost Evidence,* 321 I.C.C. 238, the railroads are attacking a full cost comparison as measuring the relative efficiency of barges and rails because such a comparison reflects the advantages inherent in bargeline use of public waterways. In this proceeding now pending before the Commission, the railroads' argument that the public cost of maintaining these waterways should be regarded as a bargeline disadvantage has been rejected by the Hearing Examiner in favor of continued use of a comparison of the full costs actually incurred by the carriers involved

to determine the low cost mode.[11] The suggestion of the Court below that out-of-pocket costs should be compared to find the low cost carrier must be rejected since no one claims that such a comparison will reflect the low cost advantage resulting from the barges' use of public waterways. The District Court's suggestion that it was unfair to include railroad passenger deficits in full cost comparison is immaterial here (J.A. 20). Even with passenger deficits excluded, the railroads fully distributed costs for the ingot mold movement in issue substantially exceed the fully distributed costs of the bargeline movement.[12]

---

[11] In his report of October 10, 1966, the Hearing Examiner rejected the railroads' contention, saying:

> There is no doubt that public costs give rise to handicaps and, if such costs are disregarded, they distort the true economic picture with respect to both relative and total use of national resources in the production of particular transportation. Nevertheless, when expenditures are expressly authorized for certain public projects which may directly or indirectly bestow special benefits on one mode to the disadvantage of another competing mode, it must be assumed that Congress was cognizant of the consequences of its actions and intended the results flowing therefrom . . . . It is not open to the regulatory agency to redetermine the reasonableness of the level of such costs, nor to remove what may be conceived as handicaps, and thus substitute its judgment for that of the legislature. As concluded by the Commission, the public-cost question is peculiarly within the competence of the Congress to determine and lies far beyond the authority delegated to the Commission (pp. 90-91).

The Commission has not yet acted upon exceptions to this report filed by the railroads and others.

[12] In Docket No. 34013, *supra*, the Examiner has also recommended the elimination of passenger deficits from full cost comparisons, but this has not eliminated railroad objections to his report.

III. Commission Intervention Is Needed to Preserve Intermodal Competition for Bargeline Traffic

The most important classes of traffic for Class A bargelines reporting to the Commission, in terms of gross revenue, during the year 1964 (the latest for which these statistics have been published), were Field Crops (011), Iron Ore (101), Bituminous Coal & Lignite (112), Products of Petroleum Refining (291), and Steel Works and Rolling Mill Products (331). These five commodity classes accounted for nearly 60 percent of Class A bargeline revenue. The following table shows the comparative gross revenues from these commodity classes during that year received by these bargelines and by their principal railroad competitors, stated in millions of dollars.

	Commodity Class	Class A Bargelines	Eastern Railroads	Southern Railroads
011	Field Crops	22	96	80
101	Iron Ore	11	114	8
112	Bituminous Coal & Lignite	39	426	175
291	Products of Petroleum Refining	8	45	31
331	Steel Works & Rolling Mill Products	23	259	51
	Totals for Five Classes	103	740	345
	Totals for All Classes	165[13]	2,730[14]	1,353[14]

[13] Figures in this column, except Totals for Five Classes, are for Class A carriers, Table 5, Part 5: Carriers by Water, I.C.C. Transport Statistics in the United States, year ended December 31, 1964. Class A water carriers are those having average annual operating revenues exceeding $500,000.

[14] Parallel figures in the column for eastern railroads are from pages 5-8, and in the column for southern railroads are from pages 13-16, I.C.C. Freight Commodity Statistics of Class I Railroads in the United States for the year ended December 31, 1964.

The table shows that Class A bargelines received less than ten percent of the total revenue of the limited classes of commodities that bargelines must carry to survive. It also shows that the total bargeline revenues from these five classes of traffic is less than three percent of total rail revenues. No argument is needed to show that by selective cuts on these commodities between points served by bargelines the railroads may destroy the business of the bargelines without any substantial decrease in railroad net revenues. As this record shows, they may achieve this result by lowering their rates below the bargelines' full costs while at the same time maintaining them above rail out-of-pocket costs.

This table also shows that the Commission's full cost comparison in rate suspension cases involving rail-barge competition has not excluded and can not exclude railroads from competing for barge traffic. A full cost comparison does permit protection of barge traffic from rail rate cuts below barge costs when the barge movement is shown to be more efficient than the rail movement by virtue of lower costs attributable to bargeline use of publicly owned and maintained waterways.

If the facts found by the Commission here, to wit, lower full costs of barges and threatened destruction of the barges as competitors for the traffic, do not justify suspension of a rail rate cut below both the rails' and the barges' full costs, it is difficult to visualize facts that would justify suspension of a rail rate to preserve intermodal competition. When the railroads chose to appeal the Commission's decision on the ground that it had erred in relying upon a comparison of rail and barge full costs, they deliberately suggested a rule of

law which would let them destroy lower cost carriers rather than compete with them. The District Court's decision would permit such a result and is therefore contrary to the Congressionally declared policy to preserve the public advantages of intermodal competition.

We respectfully submit that the District Court's decision should be reversed.

Respectfully submitted,

A. ALVIS LAYNE
915 Pennsylvania Building
Washington, D. C. 20004

ROBERT L. WRIGHT
1000 Woodward Building
Washington, D. C. 20005

Attorneys for Appellant, The American Waterways Operators, Inc.

S. RUSSELL SMITH
500 Marion E. Taylor Building
Louisville, Kentucky 40202
Of Counsel

March 1968